SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 427

THE FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF AMICUS CURIAE OF THE NEW YORK STATE BANKERS ASSOCIATION IN SUPPORT OF THE STATEMENT AS TO JURISDICTION.

PETER KEBER,
Counsel for the New York State Bankers Association, Amicus Curiae.

DORSEY, BURKE AND KEBER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

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No. 427

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff-Respondent,

against

THE FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,
Defendant-Appellant

BRIEF OF THE NEW YORK STATE BANKERS ASSOCIATION IN SUPPORT OF JURISDICTIONAL STATEMENT FILED BY DEFENDANT-APPELLANT.

This brief is submitted by the New York State Bankers Association with the written consent of both parties to the action pursuant to Rule 27 (9b) of the Rules of this Court. The consent is annexed hereto.

The New York State Bankers Association is composed of more than 650 banks and trust companies located throughout New York State. Included are 369 national banks. Believing that such banks were directly concerned, the Association filed a brief as *amicus curiae* in the Court of Appeals in which it supported defendant's position. In so doing and in here urging this Court to accept jurisdic-

tion, the Association is endeavoring to carry out its function of promoting, in the public interest, sound commercial practices. It respectfully submits that Section 258 (1) of the New York State Banking Law, as construed by the Court of Appeals, impedes such practices by seriously impairing the ability of all national banks located in New York to carry on an important phase of their business—an activity expressly authorized by the Federal Reserve Act, (Section 24; 12 USC Section 371).

The Question Is Substantial

The Association respectfully submits that a fundamental conflict exists between the authority conferred upon national banks by Section 24 of the Federal Reserve Act to receive "savings deposits" and the prohibition contained in Section 258 (1) of the State Banking Law which, as construed by the Court of Appeals, prohibits the use of the word "saving" or "savings" in its advertisements and in its banking or financial business in its dealing with the public.

A

The nature of the basis conflict is suggested by the majority opinion of the Court of Appeals which stated in substance that except for the defendant-appellant no national bank operating in New York had failed to heed Section 258 (1) of the State Banking Law and that all national banks had complied by using "synonymous expressions." It is thus indicated that acquiescence alone might establish the validity of the statute against constitutional attack. Assuming that all national banks had complied (a fact not established in the record), nevertheless, it seems clear that such compliance with a State statute does not and should not estop national banks from asserting their claim of unconstitutionality nor should

it constitute a waiver of their rights, and more particularly the right of the defendant-appellant, who has not complied, to attack the constitutionality of the statute. (cf. *Abie State Bank v. Weaver*, (1930) 282 U. S. 765, 775-6.

The mere fact that national banks have had to use what the Court of Appeals describes as "synonymous expressions" such as "special interest account," "thrift account," etc., not only has the effect of defeating the avowed purpose of Section 258 (1) of the State Banking Law if the expressions are "synonymous" but also defeats the express authority granted national banks by Section 24 of the Federal Reserve Act if the expressions are not synonymous.

It is significant, then, that the question here involved concerns not merely a single bank, to wit, defendant-appellant, as the opinion of the Court of Appeals implies, it directly affects all national banks operating in New York State.

B

A review by this Court of the judgment appealed from is indicated by the further fact that the majority opinion of the Court of Appeals contains substantial errors. Some are referred to in the jurisdictional statement of defendant-appellant and others are briefly noted below.

Thus, the Court states that use by national banks of the interdicted words is misleading because the words have reference to mutual savings banks as distinguished from commercial banks. In reaching this conclusion, the Court failed to recognize that the New York statute itself contemplates a considerably wider usage; that it permits use of the prohibited words by other types of institutions, particularly savings and loan associations, in addition to savings banks.

The allowed usage is significant because the relationship between a national bank and its savings depositors is closely analogous to that of a savings bank and its depositors, while the contrary is true in the case of savings and loan associations. Savings and loan associations do not receive deposits. They merely sell shares. Their savings accounts constitute their capital. The account holders never become creditors, only shareholders, and so, never can sue for payment as creditors. The account holders, as shareholders, vote on corporate matters, having one vote for each $100 or withdrawal value of their respective accounts. The method of repayment is regulated by statute (New York Banking Law, Section 378; 12 USCA, Section 1464(b); Rules and Regulations of Federal Savings and Loan Associations, Chapter 1 (c), Title 24, C.F.R.).

In the case of savings and national banks, on the other hand, the relationship between the banks and their depositors is, for all practical purposes, the same. Depositors are creditors; they receive what amounts to interest on their deposits; passbooks are required in order to make withdrawals; the right to withdraw is absolute upon the giving of necessary notice; depositors have no right to vote or control management. The fact that a savings bank has no stockholders while a national bank has is of no practical consequence to a depositor. (*People v. Mechanics and Traders Savings Institution*, 92 N. Y. 7).

It is thus apparent that the restricted definition given the word "savings" by the Court of Appeals is without basis. For it is clear that there is practically no difference between the savings accounts of savings banks and of national banks; that there is, on the other hand, a wide and substantial difference between them and the savings accounts of savings and loan associations.

The majority opinion below indicates that usage by a national bank is deceptive for the further reason that nat-

al banks are operated primarily for the profit of their ckholders, while the fundamental purpose of savings nks, it says, is the protection of small depositors through ution and conservatism in investments. It is submitted t as a basis for distinguishing between the two types banks at the present time, the proposition clearly lacks bstance. As pointed out by the trial court below, since e deposits of both savings banks and national banks are sured by the Federal Deposit Insurance Corporation, the ed for protecting small depositors, which once existed d formed the basis for the state statute, is no longer resent.

If there be any doubt that, with the insurance afforded y the Federal Deposit Insurance Corporation on savings eposits in all national banks—as on those in savings banks —savings are just as safe in national banks as in other nstitutions, a reading of Section 258 itself will dispel this. n sub-section 2 of Section 258, the state Legislature, by mendment in 1952, expressly provided that savings ac- ounts of school children and philanthropic institutions may now be deposited in national banks on the same basis as they previously were in savings banks. The amendment, we submit, furnishes incontrovertible evidence that the Legislature now considers savings deposited in national banks as safe as those in savings banks and savings and loan associations.

Regarding the alleged conservatism required in the making of investments by savings banks—as distinguished, we presume, from the investment policies of national banks —the history of the governing statutes is particularly noteworthy. A review of such statutes shows that the investment powers of savings banks have been, over the years, widely broadened. In 1937 (Laws of 1937, Chap. 686) savings banks were given permission to invest in Canadian securities; in 1946 (Laws of 1946, Chap. 507) they were

authorized to invest in obligations of the International Bank for Reconstruction and Development; in 1949 (Laws of 1949, Chap. 522) they were empowered to invest in corporate interest bearing securities not otherwise eligible for investment; and in 1952 (Laws of 1952, Chap. 705) the savings banks of the state were expressly authorized to invest in the preferred and common stocks of business corporations—investments which national banks are not empowered to make.

Clearly, the conclusion of the Court so far as it is based upon the alleged caution and conservative investment policy required of savings banks, as distinguished from national banks, is without support. And the need for protecting "small depositors" from being misled by commercial banks, however great when the state law was originally enacted, obviously exists no longer.

Conclusion

It is respectfully submitted that the question presented by the appeal is substantial and that this court should assume jurisdiction.

Respectfully submitted,

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Counsel for New York State Bankers Association, Amicus Curiae.

PETER KEBER,
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